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No. 88-2087

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL AUTOMATIC PRODUCTS COMPANY,
Petitioner,

vs.

AMERICAN AIRLINES, INC.,
EX-CELL-O CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The sole question presented for review is whether the Oklahoma Supreme Court erred in determining, in its 1985 opinion, that the Tulsa County District Court could properly exercise personal jurisdiction over Petitioner within the limits imposed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

(The foregoing statement of the question presented assumes, *arguendo,* that Petitioner can successfully establish, in the face of several irremediable procedural defaults, that this Court has certiorari jurisdiction in this case. *See* Proposition I, *infra.*)

LIST OF RESPONDENTS AND RELATED COMPANIES

American Airlines, Inc.

Fuel Systems Textron, Inc. (Ex-Cell-O Corporation), subsidiary of Textron, Inc.

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The Respondents, American Airlines, Inc. and Ex-Cell-O Corporation (herein "American Airlines"), respectfully request that this Court deny the Petition of National Automatic Products Company (herein "NAPCO") for a Writ of Certiorari, seeking review of a 1985 opinion of the Supreme Court of Oklahoma and a 1989 opinion of the Oklahoma Court of Appeals.[1]

[1]Neither opinion was released for publication. The opinions are printed at Appendix A and Appendix B, respectively, and attached to this Brief.

JURISDICTION

This Court lacks certiorari jurisdiction in this case. Petitioner has petitioned for a writ of certiorari, requesting that this Court review two Oklahoma appellate court decisions. *See* Proposition I, *infra.* This Court lacks jurisdiction to review the 1989 Oklahoma Court of Appeals judgment because, by virtue of procedural defaults during the Oklahoma appellate process, the judgment was not rendered by the highest Oklahoma court in which a decision could be had. This Court lacks jurisdiction to review the 1985 decision of the Oklahoma Supreme Court because that decision was a final decision on the merits of the federal question and review of that decision in this Court was not timely sought. Further discussion of these jurisdictional defects is contained below in Proposition I of Reasons for Denying the Writ.[2]

CONSTITUTIONAL PROVISION INVOLVED

The only statute or constitutional provision involved in this matter[3] is the Due Process Clause of the Fourteenth Amendment, which states in pertinent part as follows: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

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[2]Petitioner also claims that 28 U.S.C. §2403(b) may be applicable. Section 2403(b) only applies where the constitutionality of a state statute is drawn into question. In the case at bar, the issue presented for review does not involve the constitutionality of a state statute, and thus, §2403(b) is not applicable.

[3]NAPCO lists the Oklahoma long-arm statute in effect when the suit was filed in 1982 (12 Okla. Stat. §1703.03) as a statute relevant to this matter. However, the sole issue for review is whether the Oklahoma Supreme Court's 1985 decision that the Oklahoma courts had personal jurisdiction over NAPCO exceeded the limits imposed by the Due Process Clause of the Fourteenth Amendment. NAPCO has not attacked the constitutionality of 12 Okla. Stat. §1703.03.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

NAPCO is in the business of manufacturing parts for aircraft engines. (Peterson Depo., p. 27).[4] One of the parts manufactured by NAPCO is a fuel nozzle nut for a Pratt & Whitney JT-9 jet engine. (Peterson Depo., pp. 30-31). The JT-9 jet engine is manufactured by Pratt & Whitney for commercial or military use. It is a large engine, used, for example, on a Boeing 747 airplane. (Peterson Depo., pp. 30-32).

NAPCO's main customers are Pratt & Whitney, Ex-Cell-O Corporation and Chrysler Corporation. (Peterson Depo., p. 16). There is a national competition for the airplane engine parts manufacturing business and a nationwide market for airplane engine parts. (Peterson Depo., pp. 40-41). NAPCO does not conduct any advertising because all of the engine manufacturers in the United States that NAPCO has the capability to serve are aware of NAPCO's manufacturing abilities. (Peterson Depo., pp. 36-37).

The accident involved in this case occurred at American Airlines' maintenance base in Tulsa, Oklahoma, in December, 1980. Between the years of 1979 and 1981, NAPCO manufactured 11,007

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[4]The Peterson Deposition and NAPCO's Answers to Interrogatories were a part of the record on appeal in the first appeal before the Oklahoma Supreme Court as ROA 413 and ROA 148, respectively. However, for purposes of clarity, references to these documents shall be designated "Peterson Depo., p. " and "NAPCO's Answers to Interrogatory Nos. ." All other references shall be designated "ROA ." (This ROA designation will indicate the record on appeal in the second appeal to the Supreme Court.) All references to the transcript of the trial of this action shall be designated as "Tr. ." (The trial of this action occurred after the decision on the first appeal became final.)

fuel nozzle nuts for the JT-9 jet engine. (Peterson Depo., p. 47; NAPCO's Answers to Interrogatory Nos. 28 and 29). Aside from NAPCO's direct shipments of its products to Oklahoma (discussed below), these fuel nozzle nuts were shipped from NAPCO's Connecticut plant to Ex-Cell-O Corporation in Michigan. In 1982, NAPCO's price for a fuel nozzle nut was $50. In 1979, the price was between $30 and $35. (Peterson Depo., p. 50). After the fuel nozzle nuts were shipped to Michigan, it was NAPCO's expectation that the nut would be shipped anywhere in the United States that it was needed for placement on a jet engine. (Peterson Depo., p. 55). NAPCO recognized that the market for its fuel nozzle nut was a nationwide market, and NAPCO intended to serve the nationwide market when it manufactured the fuel nozzle nut. (Peterson Depo., p. 58).

In 1976, NAPCO shipped fuel nozzle nuts for a TF-30 airplane engine directly to Tinker Air Force Base in Midwest City, Oklahoma. (Peterson Depo., pp. 51-52).

American Airlines, a commercial airline carrier, has a major maintenance and engineering center in Tulsa, Oklahoma. (Tr. Vol. I, p. 33). At this maintenance and engineering center, American Airlines refurbishes, maintains and repairs the aircraft and engines for its fleet. (Tr. Vol. I, p. 34).

On December 29, 1980, while American Airlines personnel were testing a Pratt & Whitney JT-9 jet engine at one of American Airlines' test cell facilities at the Tulsa, Oklahoma maintenance and engineering center, a fire occurred, originating from the engine. (Tr. Vol. I, p. 39). As a

result of the fire, American Airlines suffered damage to the test cell facility and to the Pratt & Whitney JT-9 jet engine in the amount of $944,545.90. (Tr. Vol. I, p. 231).

An investigation at American Airlines after the fire determined that the cause of the fire was a defectively manufactured fuel nozzle nut. (Tr. Vol. I, pp. 108-109). It was determined that the defective nut in question had been manufactured by NAPCO, who sold the nut to Ex-Cell-O Corporation, who in turn sold the nut to Pratt & Whitney (a division of United Technologies, Inc.), who in turn sold the nut to American Airlines. (Tr. Vol. I, pp. 281-282). NAPCO derived between $14,760 and $24,600 in revenues from the sale of 492 fuel nozzle nuts for use in Oklahoma by American Airlines at its maintenance plant in the years 1980 and 1981. (1985 Opinion of the Oklahoma Supreme Court, Appendix A at pp. 6-7), (1983 ROA 392, Exhibit B).

B. THE OKLAHOMA PROCEEDINGS.

American Airlines filed suit in the District Court in Tulsa County, Oklahoma, seeking a judgment against United Technologies, Inc. (herein "United"), Ex-Cell-O Corporation (herein "Ex-Cell-O") and NAPCO. American Airlines' Petition contained counts of negligence, breach of implied warranty and manufacturer's products liability (strict liability in tort) against all defendants. (ROA 1-9). The defendants filed special appearances, motions to quash and pleas to the jurisdiction. (ROA 16-17, 18-19, 20-22). The trial court granted the motions of United and NAPCO to dismiss. (*See* Nunc Pro Tunc Order attached

hereto as Appendix C.)[5] The trial court's dismissal was appealed by American Airlines to the Supreme Court of the State of Oklahoma in 1983.

On January 20, 1985, the Oklahoma Supreme Court reversed and remanded the order of the trial court, finding that the Tulsa County District Court had personal jurisdiction over NAPCO and United. NAPCO and United both timely filed petitions for rehearing pursuant to Rule 28 of the Rules of the Supreme Court of Oklahoma. On March 4, 1985, the Supreme Court granted the rehearing and issued a correction order for the limited purpose of adding a name to a list of attorneys. The Court denied all other points raised upon rehearing. Subsequently, on March 11, 1985, a mandate was issued by the Oklahoma Supreme Court to the District Court of Tulsa County reversing and remanding the trial court's order and ordering the trial court to take such further action as may be in accord with the Supreme Court's opinion. (A copy of the Mandate is attached hereto as Appendix D.)

The case was set for trial in March 1987. Prior to trial, American Airlines settled with United and with Ex-Cell-O. American Airlines and Ex-Cell-O then proceeded jointly to trial against NAPCO on American Airlines' claims for negligence, breach of implied warranty and manufacturer's products liability and on Ex-Cell-O's claim for indemnity. The action was tried to a jury. At trial, NAPCO's chief of quality control admitted

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[5]It was stipulated between the parties that, if the Supreme Court upheld the trial court's dismissals, Ex-Cell-O would also be dismissed from the action, and if the Oklahoma Supreme Court reversed and remanded the trial court's ruling, Ex-Cell-O would agree to submit to the jurisdiction of the Court.

that the fuel nozzle nut in question was a NAPCO nut and was defective (Tr. Vol. I, pp. 241, 242, 251, 252). The jury returned a verdict against NAPCO for liability on the issues of manufacturer's products liability and breach of implied warranty of merchantability and awarded damages in the amount of $944,545.90. (Tr. Vol. I, p. 482).

NAPCO filed a motion for new trial. (ROA 1793-1795). After the trial court overruled NAPCO's motion for new trial (ROA 1882), NAPCO filed an appeal. During the pendency of the second appeal, American Airlines assigned its interest in the judgment to Ex-Cell-O. The second appeal was assigned to the Oklahoma Court of Appeals. The Court of Appeals rendered a decision affirming the verdict and judgment of the trial court on March 7, 1989. On April 6, 1989, pursuant to Rule 3.19 of the Rules of the Oklahoma Court of Appeals, the clerk of the Oklahoma appellate courts issued a mandate to the Tulsa County District Court affirming the judgment of the court and verdict of the jury. (A copy of the Mandate is attached hereto as Appendix E.) The mandate was received by the trial judge and ordered filed and spread of record on April 12, 1989. Two weeks later, on April 28, 1989, NAPCO filed a motion for rehearing in the Oklahoma Court of Appeals.

Subsequently, on June 2, 1989, NAPCO filed a Notice of Appeal to the Supreme Court of the United States and filed a Jurisdictional Statement with this Court. NAPCO was notified by letter that its Jurisdictional Statement will be considered to be a Petition for Writ of Certiorari and was requested to make corrections in the

Jurisdictional Statement. The corrected petition for certiorari was received by this Court on June 23, 1989.

REASONS FOR DENYING THE WRIT

Proposition I

THE WRIT SHOULD BE DENIED BECAUSE THIS COURT LACKS JURISDICTION TO REVIEW EITHER THE 1985 OKLAHOMA SUPREME COURT JUDGMENT OR THE 1989 OKLAHOMA COURT OF APPEALS JUDGMENT.

A. **This Court lacks jurisdiction to review the 1985 Oklahoma Supreme Court decision because NAPCO's Petition is untimely.**

28 U.S.C. §2101 provides that any writ of certiorari that is intended to bring any judgment or decree in a civil action before the Supreme Court for review shall be applied for within 90 days after the entry of such judgment or decree. The Oklahoma Supreme Court's 1985 decision was entered on January 29, 1985. The appellees all filed petitions for rehearing, which were denied by the Court on Tuesday, March 5, 1985. Subsequently, the mandate was issued to the trial court on April 12, 1985 (Appendix C). At that point, the Oklahoma appellate proceedings were final, and the matter was ripe for the filing of a petition for certiorari in this Court. *See* Oklahoma Supreme Court Rules 28, 29, 33; 28 U.S.C. §2101. (Copies of all pertinent Oklahoma Court Rules are attached hereto as Appendix H.)

NAPCO failed to seek review of the 1985 decision in the United States Supreme Court within 90

days of March 5, 1985. NAPCO now attempts to seek review of the 1985 decision, more than four years after its entry and after NAPCO was afforded a full and fair trial on the merits.

It is well settled that a decision by the highest state court in which review could be had that the courts of a state have personal jurisdiction over a non-resident defendant is a final decision within the meaning of 28 U.S.C. §1257 and, thus, can be reviewed by this Court, even though there has not yet been a trial on the merits. *Shaffer v. Heitner,* 433 U.S. 186, 195, 97 S.Ct. 2569, 2575 (*n.* 12), 53 L.Ed.2d 683 (1977), *Calder v. Jones,* 465 U.S. 783, 788 (*n.* 8), 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804 (1984). This Court has considered such decisions to be final because the judgment is plainly final on the federal issue and is not subject to further review in the state courts. *Shaffer v. Heitner, supra, Calder v. Jones, supra.* Research does not reveal a single case where this Court reviewed the issue of personal jurisdiction over a non-resident defendant where, as here, following a decision by the highest state court that it had personal jurisdiction over the non-resident defendant, the defendant failed to seek review, submitted to trial, appealed the issue again through the state court system, and attempted to appeal *both* state court decisions after the rendition of the second decision. Personal jurisdiction issues have come before this Court (since *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)) either upon review of a state court decision finding personal jurisdiction, or after a trial on the merits where there was not a first appeal on the jurisdictional issue.

In *Ins. Corp. of Ireland v. Compagnie Des Bauxites,* 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982), this Court discussed the nature of the constitutional requirement that a court have personal jurisdiction over a non-resident defendant. In *Ins. Corp. of Ireland,* a non-resident defendant had filed a special appearance and contested personal jurisdiction over it. The district court made a finding that it had personal jurisdiction over the non-resident defendant as a sanction for refusal by that defendant to comply with discovery aimed at determining whether or not facts existed that justified jurisdiction of the Court over the defendant. The Court of Appeals affirmed the district court's decision and this Court affirmed the judgment of the Court of Appeals. This Court found that

> the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. . . . The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not. *Id.* at 705, 102 S.Ct. at 2105.

This Court also found that the expression of legal rights is often subject to certain procedural rules and that the failure to follow these rules may well result in a curtailment of the rights. *Id.* at 705, 102 S.Ct. at 2105. This Court further found that

> [b]y submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction: **That decision will be**

> **res judicata on that issue in any further proceedings.** *Id.* at 706, 102 S.Ct. at 2106 (emphasis added).

Accordingly, the 1985 decision was final on the federal question and, thus, subject to review by this Court in 1985. NAPCO, by failing to obtain a review of the 1985 decision in this Court, submitted to the jurisdiction of the Oklahoma courts and was, thus, precluded from seeking any further review of the 1985 decision.

In *Department of Banking v. Pink,* 317 U.S. 264, 63 S.Ct. 233, 87 L.Ed. 254 (1942), a petition for writ of certiorari was denied for want of jurisdiction when it was not made within three months from a final judgment of the highest state court. This Court held that the object of the three-month statute is to limit an applicant's time to three months from the date when the finality of the judgment for purposes of review is established.

Likewise, in *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 43 S.Ct. 458, 67 L.Ed. 719 (1923), this Court found that it lacked jurisdiction to review the merits of a final decree on writ of certiorari applied for more than three months after the final decree was entered. In *Toledo Scale,* the trial court entered a final decree to enjoin infringement of a patent and for an accounting of profits. The appeals court affirmed the judgment for accounting of profits. The defendant petitioned for a writ of certiorari in the Supreme Court and was denied. The Court of Appeals then entered an order and mandate and enjoined the defendant from maintaining a suit

elsewhere. The defendant then petitioned for certiorari again. This Court denied defendant's petition as untimely.

Similarly, in *Hill v. Chicago and E.R. Co.*, 140 U.S. 52, 11 S.Ct. 690, 35 L.Ed. 331 (1891), this Court dismissed plaintiff's appeal because it lacked jurisdiction. In *Hill*, the plaintiff filed a suit to compel transfer of shares of stock. The district court ordered that the case be dismissed as to some of the defendants and referred the remaining case to a master to determine certain factual issues. The plaintiff appealed the order of the court to this Court but did not file a transcript and the appeal was dismissed. Subsequently, the master made his report which was confirmed by the trial court. The plaintiff again appealed to the United States Supreme Court. This Court determined that none of the matters determined by the earlier judgment were open for consideration upon the plaintiff's second appeal because the earlier judgment was final on the matters it had determined.

Consequently, this Court lacks jurisdiction to review the 1985 judgment of the Oklahoma Supreme Court because NAPCO did not seek review of that judgment within 90 days of the date on which that judgment became final.

B. **This Court lacks jurisdiction to review the 1989 judgment of the Oklahoma Court of Appeals because NAPCO failed to seek review, by the Oklahoma Supreme Court, of the decision of the Oklahoma Court of Appeals, with the result that the 1989 judgment is not a judgment of the highest state court.**

As is shown with particularity below, NAPCO failed, as a result of procedural defaults which violated unmistakably clear Oklahoma appellate rules, to either (i) timely seek a rehearing as to the 1989 decision of the Oklahoma Court of Appeals or (ii) seek review of the 1989 Oklahoma Court of Appeals decision by the Oklahoma Supreme Court. Consequently, NAPCO forfeited any possibility of Oklahoma Supreme Court review of the Oklahoma Court of Appeals decision, with the result that, although Oklahoma Supreme Court review was available, there is not, and will never be, an Oklahoma Supreme Court decision reviewing the decision of the Oklahoma Court of Appeals.

On March 7, 1989, the Oklahoma Court of Appeals affirmed the judgment and jury verdict of the trial court. Subsequently, on April 6, 1989, after the time had passed for the parties to seek further review of the judgment in the Oklahoma appellate system,[6] the Oklahoma Supreme Court issued a mandate to the trial court commanding the trial court to show the affirmance of its judgment of record. The mandate was received by the district judge and ordered filed and spread of record on April 12, 1989. The mandate was then filed in the district court on April 13, 1989.

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[6]The Rules of the Oklahoma Court of Appeals provide that a petition for rehearing shall be filed with the clerk of the court within 20 days from the date upon which the opinion in the cause is filed. (*See* Rule 3.9 of the Rules of the Oklahoma Court of Appeals and Rule 28 of the Rules of the Oklahoma Supreme Court.) Rule 3.13 of the Rules of the Oklahoma Court of Appeals sets forth the criteria for review of a Court of Appeals decision by the Oklahoma Supreme Court. Rule 3.13(b) states that "a party who did not petition for rehearing in the Court of Appeals may not petition for certiorari."

Subsequently, on April 28, 1989, NAPCO filed a petition for rehearing in the Oklahoma Court of Appeals, more than 20 days after the date of the opinion and several weeks after the mandate had been filed and spread of record in the District Court of Tulsa County. Rule 3.19 of the Rules of the Oklahoma Court of Appeals provides that, if there is no rehearing sought within the time prescribed by Rule 3.9, or if a petition for rehearing is denied and a writ of certiorari is not sought from the Oklahoma Supreme Court as provided in these rules, or if certiorari is denied by the Supreme Court, the Chief Justice will direct the clerk of the Supreme Court to issue a mandate.

Consequently, when NAPCO failed to file a petition for rehearing in the Oklahoma Court of Appeals within 20 days after the date of the Oklahoma Court of Appeals decision, it forfeited its right to review of the Court of Appeals decision by the Oklahoma Supreme Court. 28 U.S.C. §1257 requires that only final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court.[7]

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[7]It should be noted that this is not a case, such as *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 455 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), in which review of the intermediate appellate court's decision by the state court of last resort was sought and denied by the court of last resort. NAPCO never sought review, by the Oklahoma Supreme Court, of the decision of the Oklahoma Court of Appeals. NAPCO's statements (Pet. 2, 8) that the opinion of the Oklahoma Court of Appeals "was affirmed by the Oklahoma Supreme Court" are, in a word, false. No such thing happened. Review by the Oklahoma Supreme Court was available, but was never sought. If discretionary review by the state court of last resort is available, that discretionary review must be sought. *See Stratton v. Stratton*, 239 U.S. 55, 36 S.Ct. 26, 60 L.Ed. 142 (1915); *Matthews v. Huwe*, 269 U.S. 262, 46 S.Ct. 108, 70 L.Ed. 265 (1925); *Banks v. California*, 395 U.S. 708, 89 S.Ct. 1901, 23 L.Ed.2d 653 (1969). Procedural default precluding review by the state

In *Costarelli v. Massachusetts,* 421 U.S. 193, 95 S.Ct. 1534, 44 L.Ed.2d 76 (1975), this Court held that where the appellant could obtain state court appellate review of an adverse decision to a higher state court, the appeal would be dismissed for want of jurisdiction because 28 U.S.C. §1257 limits United States Supreme Court review to the judgments of highest state courts in which a decision could be had. *See also, Sandquist v. California,* 419 U.S. 1066, 95 S.Ct. 651, 42 L.Ed.2d 662 (1974) and *Matthews v. Huwe, n.* 7, *supra.*

Accordingly, because NAPCO failed to follow the proper procedure to seek review of the Court of Appeals decision to the Oklahoma Supreme Court, this Court lacks jurisdiction to review the 1989 judgment of the Oklahoma Court of Appeals.

Proposition II

THE WRIT SHOULD BE DENIED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

In the event that this Court determines that it has jurisdiction to review the opinions of the Oklahoma appellate courts, the writ should still be denied for want of a substantial federal question. Rule 17 of the Rules of the United States Supreme Court sets forth the character of reasons that will support a writ of certiorari. The only reason listed that has any applicability to the case at bar is "when a state court . . . has decided a federal question in a way in conflict with applicable decisions of this Court." (Rule 17(c)). In this

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court of last resort is fatal to review in this Court. *Gotthilf v. Sills,* 375 U.S. 79, 84 S.Ct. 187, 11 L.Ed.2d 159 (1963).

case, the federal question is whether the 1985 decision of the Oklahoma Supreme Court, asserting personal jurisdiction over NAPCO, is within constitutional limits. When the facts in this case are compared with the relevant decisions of this Court, it becomes clear that the 1985 decision does not conflict with this Court's decisions.[8]

NAPCO manufactured engine parts for aircraft engines. NAPCO was aware that there was a nationwide competition to supply aircraft engine parts to the few users of those parts and that the market is a nationwide market. NAPCO does no advertising because the engine manufacturers and aircraft operators that are its customers are all aware of NAPCO's manufacturing capabilities. NAPCO is aware that the market for fuel nozzle nuts (the defective part at issue in this action) is a nationwide market, and NAPCO intends to serve that market when it manufactures the nuts. Further, NAPCO had previously shipped fuel nozzle nuts **directly to Tinker Air Force Base in Oklahoma.** It was NAPCO's expectation that its fuel nozzle nut could be shipped anywhere in the United States and used on very large engines which could either fly to or be serviced at certain locations all over the world. In 1980 and 1981, NAPCO derived revenue between $14,760 and

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[8]The petition for certiorari is laced with references to matters, such as choice of law and evidentiary rulings, which are wholly irrelevant to the question of in personam jurisdiction presented by the petition. Because of the irrelevance of these points to the question presented, we have resisted the temptation to demonstrate at length the reasons for which such matters as petitioner's novel contentions as to choice of law are, to put it charitably, without merit.

$24,600 from the sale of 492 fuel nozzle nuts for use in the State of Oklahoma by American Airlines. These facts show that NAPCO had sufficient minimum contacts with the State of Oklahoma and that there was a sufficient relationship between NAPCO, the forum and the litigation such that NAPCO could reasonably anticipate being haled into court in Oklahoma.

In *Worldwide Volkswagen v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), residents of New York purchased an automobile from a New York automobile retailer. The following year, the plaintiffs, while passing through the State of Oklahoma on their way to a new home in Arizona, were involved in an automobile accident. The plaintiffs brought a products liability action at the place the accident occurred, joining as defendants the manufacturer, the importer, a regional distributor and a retailer dealer. This Court found that the regional distributor (whose region was limited to New York, New Jersey and Connecticut) and the retail dealer, located in New York, did not possess sufficient minimum contacts with the State of Oklahoma to warrant the exercise of jurisdiction over them. However, NAPCO's position is completely different from the position of the regional distributor and the retailer in *Worldwide Volkswagen*. NAPCO, the manufacturer of aircraft parts, seeks to serve and does serve a nationwide market, whereas the automobile wholesaler and retailer in *Worldwide* only sought to serve a small, defined area. NAPCO had previous direct contact with the State of

Oklahoma and derived substantial revenues from its products that were sold to Oklahoma buyers and used in the State of Oklahoma.[9]

In *Worldwide Volkswagen,* this Court listed several factors that should be considered in determining whether or not it is reasonable to require a non-resident to defend a suit in a particular forum. These factors include the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief and the interstate judicial system's interest in obtaining the most efficient resolution of controversies.

In the case at bar, Oklahoma, the forum state, has an interest in adjudicating the dispute because the accident happened at a large service facility that has been maintained by American Airlines in the State of Oklahoma for many years. A state generally has a manifest interest in providing its residents with a convenient form for redressing injuries inflicted by out-of-state acters. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

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[9]NAPCO highlights the fact that the fuel nozzle nuts were shipped f.o.b. its Connecticut plant and that subsequent sales of the nuts from Ex-Cell-O and United Technologies were also shipped f.o.b. at points outside of Oklahoma. Technical considerations, such as f.o.b. points, are irrelevant to a determination of whether or not a non-resident defendant has sufficient minimum contacts with a state to enable that state's courts to exercise personal jurisdiction over it. *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (personal jurisdiction upheld even though all products were shipped into the State of Washington f.o.b. points out of state). *See also General Motors Corporation v. Washington,* 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964) and *N.W. States Portland Cement Co. v. State of Minnesota,* 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959) (state's taxing power upheld on receipts from sales of products shipped into state f.o.b. out-of-state locations, where other facts showed the tax bore a reasonable relation to

Further, American Airlines had an interest in obtaining convenient and effective relief in Oklahoma. In connection with its claim, American Airlines sued companies with principal places of business in Connecticut, Texas and Michigan. Any of those forums would be inconvenient for American Airlines and most of the Defendants. Additionally, all of the witnesses to the accident were in Oklahoma, as was all of the evidence of the damage.

Finally, the interstate judicial system's interest in obtaining the most efficient resolution of controversies militates in favor of an Oklahoma forum since Oklahoma was the situs of the accident, and, again, the witnesses to the accident and the evidence of the damage were all located in Oklahoma.

Minimum contacts with a forum can be established by a single act so long as it creates a substantial connection with a forum. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Additionally, when a defendant has availed itself of the privilege of conducting business in a forum, jurisdiction cannot be avoided merely because the defendant did not physically enter the forum state.

Moreover,

> [t]he forum state does not exceed its powers under the Due Process Clause if

---

the corporations' activities in the state) and *National Labor Relations Board v. Friedman-Harry Marks C. Co.,* 301 U.S. 58, 56 S.Ct. 645, 81 L.Ed. 921 (1937) (corporation found to be engaged in interstate commerce and, thus, subject to the National Labor Relations Act despite fact that all orders were shipped f.o.b. from one manufacturing plant in Richmond, Virginia).

> it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. *World-wide Volkswagen Corporation v. Woodson,* 444 U.S. 286, 297-298, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

In the case at bar, NAPCO sold fuel nozzle nuts to Tinker Air Force Base in Oklahoma a few years before the accident at the American Airlines service facility. It continued to intend to serve a nationwide market in airplane engine parts and fuel nozzle nuts. NAPCO delivered its product (the fuel nozzle nut) into the stream of commerce with the expectation that either the fuel nozzle nut or the engine of which the fuel nozzle nut was a part would be purchased by consumers in Oklahoma and every other state in the United States. Thus, Oklahoma did not exceed the limits imposed by the Due Process Clause by asserting personal jurisdiction over NAPCO.

In support of its argument that the Oklahoma courts exceeded the limits imposed by the Due Process Clause in asserting jurisdiction over it, NAPCO cites the case of *Ashai Metal Industries Co. v. Superior Court of California,* 408 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). However, the facts in *Ashai Metal* are distinguishable from the facts in the case at bar. This Court recognized in *Ashai Metal* that one of the facts critical to its decision was the fact that the defendant was a foreign defendant (a Japanese manufacturer of tire valve stem assemblies). This Court considered not only the inconvenience of a California forum but the fact that the Japanese manufac-

turer would have to submit to a foreign judicial system as well. Those concerns are not present in the case at bar. NAPCO is an American, not a Japanese, corporation which, in the past, had directly done business with an Oklahoma resident and intended to be a part of the nationwide market in aircraft engine parts. NAPCO did much more than place its fuel nozzle nuts in the stream of commerce; it sought to manufacture aircraft engine parts that would be used by business consumers (the manufacturers and purchasers of aircraft engines) in every state in the United States. Accordingly, because Oklahoma did not exceed the limits imposed by the Due Process Clause by asserting personal jurisdiction over NAPCO, NAPCO has failed to present a substantial federal question for review by this Court and, thus, the writ should be denied.

CONCLUSION

Therefore, for the reasons discussed above, NAPCO's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

/s/ Stephen P. Friot

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Counsel for Respondents

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 60,005

AMERICAN AIRLINES INC.,
A DELAWARE CORPORATION,
Appellant,

VS.

UNITED TECHNOLOGIES, INC.,
EX-CELL-O CORPORATION, AND
NATIONAL AUTOMATIC PRODUCTS COMPANY,
Appellees.

Appeal From the District Court
of Tulsa County
Honorable Clifford E. Hopper

Appeal from nunc pro tunc order granting motions to dismiss for lack of personal jurisdiction over non-resident corporations pursuant to 12 O.S. 1981, §1701.3.

REVERSED AND REMANDED

H. Jerome Gette
Robins, Zelle, Larson & Kaplan
Dallas, Texas

Gene C. Buzzard
Waddell & Buzzard
Tulsa, Oklahoma

For Appellant,
American Airlines, Inc.

Kirk D. Fredrickson
James T. Dupre'
Fredrickson, Merrick & Patton
Oklahoma City, Oklahoma

For Appellees,

L. Ray Pearce
The Carlton Firm
Dallas, Texas

National Automatic Products Co., Comtec, Inc., & Commercial Technology, Inc.

DOOLIN, J.

We must determine, consistent with due process requirements, whether a nonresident tool manufacturer which conforms its parts to the specifications of users and a nonresident distributor of those parts may be sued in Oklahoma, where the allegedly defective part was delivered and where it caused substantial property damage to the user.

The facts of this action are undisputed. Pursuant to customer specifications, defendant NAPCO manufactures aircraft parts and components. In this case, NAPCO manufactured fuel nozzle nuts according to specifications provided by, and an order placed by, defendant Ex-Cell-O. The nuts were then delivered "F.O.B. Connecticut" to a carrier for shipment to Ex-Cell-O's Michigan plant, where they were shipped "F.O.B." to defendant United Technologies, Inc. (United) in Connecticut. United, in turn, sold the nuts to American Airlines, shipping them "F.O.B. Connecticut" to New York. American then transported the nuts to its aircraft maintenance facility in Tulsa, Oklahoma. After the nut was installed in a JT-9 engine, its allegedly improper tolerances allowed fuel to leak and ignite, thereby damaging American's property in the amount of $1,000,000.

A suit based on negligence, implied warranty, and strict liability was brought against NAPCO, Ex-Cell-O and United Technologies, Inc. in the District Court of Tulsa County. Comtec, Inc. (Comtec) and Commercial Technology, Inc. (Commercial), the alter egos of NAPCO, were later joined as additional defendants. These defendants each filed a special appearance and a motion to contest personal jurisdiction. After a hearing on the motions, it was stipulated that Ex-Cell-

O would not contest Oklahoma jurisdiction unless NAPCO and United were held subject to it. Similarly, liability of Comtec and Commercial would exist only if NAPCO is liable.

By its nunc pro tunc order, the trial court granted the NAPCO and United motions to dismiss and subsequently granted the Comtec and Commercial motions to dismiss. From these orders dismissing the defendants for lack of personal jurisdiction, American appeals.

The Supreme Court, in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), and *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), determined that a nonresident is subject to personal jurisdiction in a forum with which he has minimum contacts if doing so does not offend the traditional notions of fair play and substantial justice. The substantiality of contact with a forum state, however, is determined by the facts of each individual case. *Vacu-Maid v. Covington*, 530 P.2d 137, 139 (Okl. 1974).

In Oklahoma, personal jurisdiction over a nonresident is governed by 12 O.S. 1981, §1703.03, which provides:

> "(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's
>
> (1) transacting any business in this state;
>
> (2) contracting to supply services or things in this state;
>
> (3) causing tortious injury in this state by an act or omission in this state;
>
> (4) causing tortious injury in this state by act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or

derives substantial revenue from goods used or consumed or services rendered, in this state;

(5) having an interest in, using, or possessing real property in this state; or

(6) contracting to insure any person, property, or risk located within this state at the time of contracting, or

(7) maintaining any other relation to this state or to persons or property including support for minor children who are residents of this state which affords a basis for the exercise of personal jurisdiction by this state consistently with the Constitution of the United States.

(b) When jurisdiction is based solely upon this section, the defendant's appearance does not authorize the exercise of personal jurisdiction except as to a cause of action or claim for relief arising in the circumstances enumerated in this section."

This "Long arm" statute extends jurisdiction of Oklahoma courts over nonresidents to the outer limit permitted by the due process clause of the 14th Amendment. That clause does not permit a state to "make binding a judgment *in personam* against an individual or corporate defendant with which the state has *no contacts, ties, or relations.*" *Henderson v. University Associates, Inc.*, 454 F. Supp. 493, 494 (N.D. Okl. 1977) [emphasis added]. Further, it is not the conduct of the plaintiff that determines jurisdiction, but the conduct of the defendant. *Jem Engineering & Mfg., Inc. v. Toomer Electrical Co.*, 413 F. Supp. 481 (N.D. Okl. 1976).

The Court of Appeals in *Vacu-Maid, supra*, stated that personal jurisdiction unquestionably would be upheld, "where the nonresident defendant is a seller

who has shipped goods into Oklahoma, even if such shipment were an isolated or infrequent occurrence." It makes no difference whether the nonresident deals directly or indirectly with the residents of the forum state. *Carmack v. Chemical Bank New York Trust Co.*, 536 P.2d 897, 900 (Okl. 1975). However, it is essential that the nonresident "*purposefully* avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hudson v. Hudson*, 569 P.2d 521, 524 (Okl. App. 1976) [emphasis added], citing from *Hanson v. Denckla*, 357 U.S. 235 (1958).

The Oklahoma Supreme Court has denied personal jurisdiction where the nonresident transacted no business in Oklahoma, engaged in no relationship with a resident in any transaction, and had no offices, employees, agents, or representatives in the state. *Barnes v. Wilson*, 580 P.2d 991, 993 (Okl. 1978); *Architectural Building Components Corp. v. Comfort*, 528 P.2d 307, 319 (Okl. 1974). The Court also did not exercise personal jurisdiction over the nonresident corporation in *Precision Polymers, Inc. v. Nelson*, 512 P.2d 811 (Okl. 1973). In *Precision*, the nonresident manufacturer who fabricated allegedly defective materials for construction projects in Oklahoma and Missouri, sold these materials to a nonresident distributor, and delivered them to sites in Oklahoma. However, the manufacturer never transacted any business or committed any act in Oklahoma in connection with the Missouri project, the subject of the lawsuit. Because the manufacturer committed no act to subject it to Oklahoma jurisdiction, jurisdiction was denied.

Jurisdiction has been upheld, however, where a nonresident manufacturer who fabricated defective component parts of an aircraft outside the forum state, sold them within the state where death occurred, and derived substantial revenues from the sales in the forum state. *Paddock v. Bensen Aircraft Corp.*, 293

F.Supp. 745 (W.D. Okl. 1968). Jurisdiction also was found where a nonresident, who had caused tortious injury in the forum state, merely gained substantial revenues therein. *Oral Roberts Univ. v. Automatic Switch Co.*, 319 F.Supp. 381 (N.D. Okl. 1970).

At first glance the present case seems aligned with *Precision, supra*; but it is clearly distinguishable. That is, we are confronted with a nonresident manufacturer, supplier, and distributor, but we cannot say that these entities maintained no relations with, or ties to, Oklahoma.

The record establishes sufficient contacts with the State. The United representative testified in his deposition that the fuel nozzle nut was designed for national and international distribution. To reach these markets, United advertises in national periodicals and engages in "vigorous and very fine advertising * * * on television and in the papers: although it focuses on no given state. While it (or its division, Pratt & Whitney) conducts no sales, transfers no title, and warehouses no goods in Oklahoma, Oklahoma is one state likely to receive a greater portion of its products. In fact, in 1979, 1980 and 1981, United indirectly supplied goods to Oklahoma. American estimates that it alone used $80,000,000 worth of parts in Oklahoma in 1980 and 1981. In addition to deriving substantial revenues from Oklahoma, United maintains personnel at Tinker AFB and at American's overhaul facility in Tulsa. With regard to United, its activities were sufficient to establish the minimum contacts required by law, and it was an abuse of discretion for the trial court to hold otherwise.

The NAPCO representative also testified that his company "intended to serve as much of the nationwide market as it could." In fact, it expected that the fuel nozzle nut would "end up" at whatever service facilities demanded them. American estimated that it received 492 fuel nozzle nuts, resulting in gross revenues

to NAPCO of $14,760 to $24,000. While NAPCO's ties to Oklahoma are less than United's, they still fall well within the minimum contacts required by due process.

Although the nonresident defendants actively court the State of Oklahoma for business, either directly or indirectly, they attempt to escape liability for damage caused therein merely by designating the place of title transfer (F.O.B. Connecticut) as the proper forum in which to be sued. Such conduct frustrates, not enhances, the notions of fair play and substantial justice, and is a perfect example of one who bites the hand that feeds it.

Accordingly, the orders of the trial court dismissing the defendants for lack of personal jurisdiction are reversed and the cause is remanded for a determination on the merits.

REVERSED AND REMANDED.

Barnes, Opala, Wilson, Kauger, JJ. - concur

Sims, C.J., Hodges, Lavender, Hargrave, JJ. - dissent

APPENDIX B

IN COURT OF APPEALS, DIVISION 4
STATE OF OKLAHOMA

No. 68,771

AMERICAN AIRLINES, INC.,
Appellee,

vs.

EX-CELL-O CORPORATION,
Appellee,

and

NATIONAL AUTOMATIC PRODUCTS COMPANY AND COMMERCIAL TECHNOLOGY, INC.,
Appellants.

Appeal From the District Court
of Tulsa County, Oklahoma
Honorable Daniel J. Boudreau, Trial Judge

Stephen P. Friot
Barbara L. Swimley
Spradling, Alpern, Friot & Gum
Oklahoma City, Oklahoma — For Appellees

B. David Gambill
Kelly & Gambill
Pawhuska, Oklahoma

Joe B. Abbey
Law Offices of Joe B. Abbey
Dallas, Texas — For Appellants

MEMORANDUM OPINION

BACON, J.

This is an appeal from a judgment based on a jury verdict in favor of American Airlines for damages occasioned by a defective fuel nozzle nut that caused a fire which damaged a jet engine and test cell.

In August 1982, American Airlines, Inc., (American) filed suit against United Technologies, Inc. (United), Ex-Cell-O Corporation (Ex-Cell-O), and National Automatic Products Company (NAPCO) for damages due to an alleged defective fuel nozzle nut.

The fuel nozzle nut was manufactured by NAPCO, who in turn sold it to Ex-Cell-O, who in turn sold it to Pratt and Whitney, a division of United, who in turn sold it to American. American's suit was based on negligence, breach of implied warranty, and manufacturer's products liability as to all defendants.

Thereafter, American filed amended petitions joining Commercial Technologies, Inc. (Commercial) and Comtec, Inc., as additional defendants, alleging that NAPCO was an instrumentality of Commercial and Comtec, and that they should be held liable along with NAPCO.

Ex-Cell-O filed a cross-petition against NAPCO, Commercial, and Comtec for indemnification. All of the defendants filed special appearances and motions to quash and pleas to the jurisdiction. The trial court granted the motions of United and NAPCO. American, in turn, appealed and on January 20, 1985, in case No. 60,005, the Supreme Court reversed and remanded the order to the trial court, finding that there was personal jurisdiction as to NAPCO, Commercial, and United.

Prior to trial, American settled with United and dismissed United with prejudice. American also set-

tled with Ex-Cell-O, and thereafter, American and Ex-Cell-O proceeded to trial against NAPCO, Commercial and Comtec.

Based on a motion made by NAPCO, the trial court bifurcated the proceedings. The first trial was to determine the liability of NAPCO, if any, and determine the amount of the damages, if any. The jury found NAPCO liable and fixed damages at $944,545.90.

The second trial was to determine whether NAPCO was an instrumentality of either Commercial or Comtec, or both, and thus liable for the same damages. At the conclusion of the second trial, the jury found that NAPCO was an instrumentality of Commercial, but not Comtec.

NAPCO and Commercial filed timely motions for a new trial which were overruled by the trial court. It is from this ruling that they appealed. Subsequently, American assigned any interest in the judgment appealed from to Ex-Cell-O.

After briefing was concluded, Ex-Cell-O and Commercial entered into a settlement agreement, and the parties agreed to dismiss the pending appeal as to Commercial only. Thus, the issues of error raised on appeal are moot as to Commercial only and we address only those points of error raised by NAPCO, the sole remaining appellant.

The first issue to be addressed is the alleged lack of personal jurisdiction as to NAPCO. This issue has already been decided in Case No. 60,005, wherein the court held that the order of the trial court dismissing United, Ex-Cell-O, and NAPCO was reversed and remanded for a determination on the merits. Once the question of jurisdiction has been raised and decided, that operates to disallow any future litigation of that issue. *Veiser v. Armstrong*, 688 P.2d 796, 802 (Okla. 1984).

Also raised as error is the denial by the trial court of a continuance when NAPCO's expert witness, Mr. Richard Allen Smith, was hospitalized and unable to appear. The trial court talked to the doctor and determined that he could be deposed and ordered the parties to do so on a day certain before trial. NAPCO did not do so. NAPCO sought to offer segments of an earlier deposition dealing with matters requiring expertise in a certain area. The trial court examined the deposition and concluded that there was no evidence Mr. Smith was qualified as an expert by knowledge, skill, experience, training, or education in subject area.

NAPCO then sought to have Mr. Lennehan substitute as an expert witness. He had at one time been endorsed as a witness, but NAPCO withdrew his name, and thus, no discovery had been conducted as to the testimony of Mr. Lennehan. The trial court denied the request.

The question of the qualifications of an expert witness is left to the sound discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion. *City of Holdenville v. Griggs*, 411 P.2d 521 (Okla. 1966).

We find no abuse of discretion on the part of the trial court in its ruling as to the lack of qualifications of Mr. Smith as an expert witness, nor the denial of the request for Mr. Lennehan to testify as a substitute for Mr. Smith when his name had been withdrawn as a witness and he was not listed on the pre-trial order.

Allowing or denying admission of evidence rests in the sound discretion of the trial court. *Jordan v. General Motors Corporation*, 590 P.2d 193, 196 (Okla. 1979). Upon review of the record we find no reversible error in respect to the trial court's decisions on the admissibility or inadmissibility of either evidence or testimony.

Where the trial court exercises its sound discretion in passing on the question of mistrial, its finding cannot be disturbed on appeal in the absence of a clear abuse of discretion. *Jordan, supra,* 195. We find no such abuse.

NAPCO urges error on the part of the trial court in admitting evidence of the 1972 convictions of Mort Zimmerman, as principal officer of Commercial, on three counts of mail fraud and securities fraud. 12 O.S. 1981 § 2609(B), permits the introduction of a conviction over ten years old if its probative value substantially outweights its prejudicial effect, and NAPCO was given sufficient advance notice of the intent to use such evidence. *United States v. Cathey,* 591 F.2d 268, 275 (5th Cir. 1979).

We find that the trial court did not err in admitting the witness's crimes involving dishonesty over ten years ago, in that we cannot say the prejudicial effect of such evidence substantially outweighted its probative value.

It is additionally urged that the trial court erred in applying Oklahoma manufacturers' products liability law, which imposes strict liability, rather than "federal procurement law." This is premised on the contract standards of quality control being government military standards, i.e., MLT-STD-105D, in the manufacture of the fuel nozzle nut.

NAPCO's proposition is that either preemption or federal contract law should prevail over state law. We find no uniquely federal interests involved herein nor any congressional authority to fashion a federal common law as to product liabilities. *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 68 L.ed.2d 500, 101 S.Ct. 2061 (1981).

Where conflicting evidence has been presented to the jury and its verdict is supported by competent evidence, it will not be disturbed on appeal. *Mitchell*

v. Ford Motor Credit Co., 688 P.2d 42 (Okla. 1984). We find there is competent evidence to support the verdict of the jury.

The judgment of the trial court in all respects is AFFIRMED.

BRIGHTMIRE, P.J., concurs, and RAPP, J., dissents.

RAPP, J., dissenting

This is an issue of products liability not at all dissimilar to the old rhyme – "for want of a nail a shoe was lost, for want of a shoe, a horse . . . ."[1] Here, a nut's wrong dimension resulted in a sequence of events culminating in an engine test cell fire. The issue of products liability was: did NAPCO manufacture and put into the stream of commerce a nut not in conformity with its engineering specifications? The evidence was that it did at some point during the years 1979 and 1980. Moreover, the evidence indicated a dimensional problem existed with this type of nut in NAPCO's manufacturing process as early as 1976, which required it to initiate one hundred percent inspection.[2] This manufacturing problem apparently continued at least through 1980, when the nut was manufactured.

NAPCO was acquired by H.P. Townsend Co. in 1979. Comtec was organized in March 1980. Zimmerman was chairman of the board of directors of Comtec. Comtec subsequently acquired NAPCO.

Zimmerman's first contact with NAPCO was in August 1979, when NAPCO contracted with a separate company to provide it with financial and legal functions and tax reporting services. Zimmerman was a member of this company's staff. The record is totally

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[1]George Herbert, "Love."

[2]It is well known within manufacturing that even one hundred percent inspection will not find and remove all defective units. Acheson J. Duncan, *Quality Control & Industrial Statistics* (1962).

devoid of any evidence Zimmerman was involved in any manner with either the engineering and development or manufacturing of the nut in question.

The purported usage of Zimmerman's conviction for mail fraud and securities violations for impeachment purposes was so far removed from the reality of the trial issues as to be patently asinine. It was intended and used for a single purpose in contravention of the statute's intent regarding convictions in excess of ten years[3] – to smear and diminish not only the testimony and character of Zimmerman, but also of all associated with him. His conviction had no probative value nor was it even remotely connected with the principal issue, other than to function as a firebrand to inflame the jury and induce bias and prejudice into their minds. It is obvious it did this work well. Accordingly, I would hold this single issue prevented a fair and impartial trial and so blinded the jury that it must be reversed and remanded for a new trial.

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[3]Title 12 O.S. 1981 § 2609; *see also* Fed. R. Evid. 404(a), which strictly limits when character evidence may be admitted to show acts in conformity with the criminal conviction. The court, in *Perrin v. Anderson,* 784 F.2d 1040, 1044 (10th Cir. 1986), stated, "Although the literal language of the exceptions to Rule 404(a) applies only to criminal cases, we agree with the District court here that, when the central issue involved in a civil case is in nature criminal, the defendant may invoke the exceptions to Rule 404(a)." Here, in this matter under review, the question and issue were strictly civil.

APPENDIX C

IN THE DISTRICT COURT FOR TULSA COUNTY
STATE OF OKLAHOMA

C.A. NO. CT-82-739

AMERICAN AIRLINES, INC.,
Plaintiff,

VS.

UNITED TECHNOLOGIES, INC.,
A DELAWARE CORPORATION,
EX-CELL-O CORPORATION,
A MICHIGAN CORPORATION, AND
NATIONAL AUTOMATIC PRODUCTS CO.,
A CORPORATION,
Defendants.

Nunc Pro Tunc Order Granting the Motions to Dismiss of United Technologies, Inc. and National Automatic Products Co. and Re-instating the Cause of Action of American Airlines, Inc. Against Ex-Cell-O Corporation

The Court has reviewed the motion of Plaintiff AMERICAN AIRLINES, INC., in the above-entitled cause asking that the Order granting the motions to dismiss of Defendants UNITED TECHNOLOGIES, INC., NATIONAL AUTOMATIC PRODUCTS CO. and EX-CELL-O CORPORATION be amended nunc pro tunc as of the date of the entry thereof to delete all reference to EX-CELL-O CORPORATION. Since Defendant EX-CELL-O CORPORATION has no objection to the Court granting this motion, the motion is hereby granted.

IT IS, THEREFORE, ORDERED by the Court that the motion of Plaintiff AMERICAN AIRLINES, INC.

that the Order herein granting the Motions to Dismiss of UNITED TECHNOLOGIES, INC., NATIONAL AUTOMATIC PRODUCTS CO. and EX-CELL-O CORPORATION be amended nunc pro tunc as of the date of the entry thereof as follows:

Now on this 25th day of March, 1983, the Court having heretofore taken under advisement the objections to in personam jurisdiction and motions to dismiss for lack of personal jurisdiction of Defendants UNITED TECHNOLOGIES CORPORATION and NATIONAL AUTOMATIC PRODUCTS CO.; and the Court having heretofore considered the pleadings, affidavits, depositions, briefs, and having heard oral argument of counsel on February 23, 1983, at which time the parties each appeared by counsel.

Now, therefore, being fully advised, the Court finds that Defendants UNITED TECHNOLOGIES, INC. and NATIONAL AUTOMATIC PRODUCTS CO.'S objections and combined motions to dismiss for lack of personal jurisdiction are meritorious and are sustained. Plaintiff's causes of action as against Defendants UNITED TECHNOLOGIES, INC. and NATIONAL AUTOMATIC PRODUCTS CO., are hereby severed from the case and are hereby dismissed, with exceptions granted to the Plaintiff.

IT IS SO ORDERED.

SIGNED on this the 30th day of March, 1983.

/s/CLIFFORD E. HOPPER
DISTRICT JUDGE

APPROVED AS TO FORM:
/s/P.C. HUNSUCKER
H. Jerome Gette
Philip C. Hunsucker
ATTORNEYS FOR PLAINTIFF
AMERICAN AIRLINES, INC.

/s/STEPHEN P. FRIOT
ATTORNEY FOR DEFENDANT
EX-CELL-O CORPORATION

APPENDIX D

STATE OF OKLAHOMA
SUPREME COURT

MANDATE

No. 60,005
Tulsa County
CT-82-739

AMERICAN AIRLINES, INC.,

vs.

UNITED TECHNOLOGIES, INC.,
EX-CELL-O CORPORATION, ET AL.

Mandate received and ordered filed and spread of record this 11th of April, 1985.

/s/ Clifford J. Hopper
Judge

District Court
Filed
April 12, 1985
Don E. Austin
Court Clerk
State of Okla.,
Tulsa County

THE SUPREME COURT OF OKLAHOMA:

To the Honorable Judge of the District Court of Tulsa County in said State of Oklahoma.

Whereas, the Supreme Court of the State of Oklahoma, did on the 29th day of January, 1985 render an Opinion in the above entitled cause, appealed from the District Court of Tulsa County.

REVERSED AND REMANDED
(with attached correction order dated 3-5-85)

Now, Therefore, you are hereby commanded to cause such Reversing and remanding to show of record in your court and to issue such process and take such other and further action as may be in accord with right and justice and said Opinion.

Witness, the Honorable Robert Simms, Chief Justice of the Supreme Court of the State of Oklahoma, at the City of Oklahoma City, this 11th day of March, 1985.

/s/JAMES W. PATTERSON
CLERK
By Barbara Clenney, Deputy

APPENDIX E

STATE OF OKLAHOMA
SUPREME COURT

MANDATE

No. 68,771
Tulsa County District Court
CT82739

AMERICAN AIRLINES, INC.,
EX-CELL-O CORP

vs.

NATIONAL AUTOMATIC PRODUCTS CO,
COMMERCIAL TECHNOLOGY, INC

Mandate received and ordered filed and spread of record this 12th day of April.

/s/ Daniel J. Boudreaux
Judge

District Court
Filed
April 13, 1989
Don E. Austin
Court Clerk
State of Okla.,
Tulsa County

THE SUPREME COURT OF OKLAHOMA:

TO THE HONORABLE JUDGE OF THE DISTRICT COURT OF TULSA COUNTY IN SAID STATE OF OKLAHOMA.

WHEREAS, THE COURT OF APPEALS OF THE STATE OF OKLAHOMA, DID ON THE 07TH DAY OF MARCH, 1989 RENDER A MEMORANDUM OPINION IN THE ABOVE ENTITLED CAUSE, APPEALED FROM THE DISTRICT COURT OF TULSA COUNTY.

AFFIRMED

NOW, THEREFORE, YOU ARE HEREBY COMMANDED TO CAUSE SUCH AFFIRMANCE TO SHOW OF RECORD IN YOUR COURT AND TO ISSUE SUCH PROCESS AND TAKE SUCH OTHER AND FURTHER ACTION AS MAY BE IN ACCORD WITH RIGHT AND JUSTICE AND SAID OPINION.

WITNESS, THE HONORABLE RUDOLPH HARGRAVE, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF OKLAHOMA, AT THE CITY OF OKLAHOMA CITY, THIS 06TH DAY OF APRIL, 1989.

/s/JAMES W. PATTERSON,
CLERK
By Debbi Dolnci, Deputy

APPENDIX F

IN THE DISTRICT COURT
IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

NO. CT 82 739

AMERICAN AIRLINES, INC.,
A DELAWARE CORPORATION,
Plaintiff,

VS.

UNITED TECHNOLOGIES, INC.,
A DELAWARE CORPORATION,
EX-CELL-O CORPORATION,
A MICHIGAN CORPORATION, AND
NATIONAL AUTOMATIC PRODUCTS COMPANY,
A CORPORATION,
Defendants.

EXCERPTS FROM THE DEPOSITION OF MR. CARL PETERSON TAKEN DECEMBER 20, 1982 BEFORE DANIEL S. NIZIANKIEWICZ, CERTIFIED SHORTHAND REPORTER

. . . p. 16

THE DEPONENT: Some housings, nozzles, I said.

BY MR. GETTE:

Q How are orders generated from your company?

A Well, actually through personal contact with the customer.

Q Okay. You have a sales force, I presume?

A No. I am the salesman.

Q You are the sales force?

A Yes.

Q You contact the customer?

A I call on the customer, yes.

Q They have needs which you hope your company can meet?

A Yes.

Q You discuss those at your meetings with them and sales results?

A Yes.

Q Is that right?

A That is it.

Q Who are some of your customers?

A Pratt and Whitney, of course, is our largest, Ex-Cell-O Corporation, Chrysler Industrial, and that is about the bulk of it. We have others, but many other small accounts.

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Q So, all of the parts you manufacture for Chrysler, when the production is complete, National Auto sends those parts to Elmwood Park, New Jersey, is that correct?

A Yes, they do.

Q As I recall from your earlier testimony, National Auto primarily manufactures parts for the airlines industry, is that right?

A Yes.

Q You manufacture parts for all types of aircraft, or do you limit your manufacturing to certain types of aircraft?

A Engine parts only.

Q How many engineers does National Auto employ?

A One designated as engineer, but actually three get involved.

Q Who are these folks?

A Ted Boryccki.

MR. KATZ: Spell it.

THE DEPONENT: I am thinking, B-O-R-Y-C-C-K-I, I believe.

MR. GETTE: I misspelled that one on my notes.

MR. KATZ: Carl might have, too.

MR. GETTE: I wasn't even in the ballpark.

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A Yes, I do.

Q What nut are we referring to?

A Part number 748333-B.

Q What is that part used for?

A Well, it is a fuel nozzle, it is used for the propulsion or part of it in the engine.

Q Do you know what engine it is used in?

A I am not sure, no.

Q Is there anyone at your company that knows that information?

A Well, I'd have to say that if the blueprint is marked with the engine model we assume it is going on to that, but we don't know.

Q Okay. Have you checked the blueprint to make a determination whether that blueprint contained the engine model?

A It does.

Q What engine model?

A The JT-9.

Q And you checked, that is, yourself personally?

A I did.

Q Although you may not know it is going to go on a JT-9, that is your assumption in the manufacturing process?

A Yes.

Q What is a JT-9 engine?

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A Well, how do you want me to describe it?

Q As best you know how.

A Well, it is an engine like any other jet engine, and it is manufactured by Pratt and Whitney for commercial use.

Q Okay. Let —

A Commercial or military. I have to amend that.

Q Let me see if I can break it down a little more. As I understand it, airplanes come in all shapes and sizes, from very small to very large, could a JT-9 engine be used on any sized airplane?

A I would say so.

Q Okay. Why do you say that?

A Because of the size of the engine.

Q Is it a large engine?

A It is a large engine, yes.

Q Is it one of the largest engines there is?

A That I don't know.

Q But it is a large engine?

A It is a large engine.

Q In the whole spectrum of engines, this is a big engine?

A Yes.

Q Are you aware of any planes that this engine would be used for?

. . . p. 32

A It is used on the 747.

Q How do you know that?

A Well, I have seen them on the 747.

Q So, you know that personally?

A Yes, I do.

Q That a JT-9 engine is manufactured for use on a 747, it is a Boeing 747, right?

A Yes.

Q Do you know if a JT-9 is used on any other aircraft?

A I don't know.

Q Would it be your assumption it is used on any other aircraft, a comparable model to a Boeing 747?

A I would say by size, yes.

Q Okay. Have you ever seen it on any other Boeing aircraft, like a 727, or any other?

A No.

Q Do you know if the JT-9 engine is used on some of the new aircraft, Boeing is coming out with, I believe, the 767?

A No, I don't.

Q You just don't know that?

A No, I don't.

Q Does anyone in your company know that?

A I am sure there is someone that must know, but I

. . . p. 36

A No, I don't.

Q Any ballpark idea?

A No.

Q But you think sometime after 1970?

A Definitely, yes.

Q Pratt and Whitney manufactures that engine, is that right?

A Yes.

Q Have you ever had any discussions with any Pratt and Whitney individuals about the JT-9 engine?

A I imagine I must have. I have been doing business with them all these years, I am sure I did.

Q I would assume in some of your sales meetings where you're promoting your company and they are promoting their company, they would tell you, "We have got a new engine, and we would like your company to do some parts for it," that conversation must have come up sometime?

A Well, it doesn't happen just that way.

Q Okay. That is an oversimplification maybe?

A No, we, again, we manufacture details, at the time of the manufacture, it is our capability rather than what engine it goes on that is considered.

Q So, you have a role in production of airline parts that the airline industry is aware of, is that right, you have a capability?

. . . p. 37

A Yes.

Q That the airline industry is aware of?

A No, I should say no to that. The engine manufacturers are.

Q Are aware of?

A Yes.

Q And they can tap into your market?

A Yes.

Q Based on their need for your capability.

A Yes.

Q Could you describe for me as clearly as you can what your capability is?

A We have a limit by part size, we go from one-half inch up to ten inches in diameter. We have equipment capable of that range.

Q So, if I am an engine manufacturer and I have got a part size in that range, I know that National Auto can supply that part to me, is that right?

A Yes.

Q Now, when did National Auto start manufacturing part number 748333-B?

A 1979.

Q How did this order come to be placed?

MR. KATZ: Are you talking about the first order?

. . . p. 40

Q Okay. Do you know which one of these individuals was responsible for the request for quotation on this fuel nozzle nut we are talking about?

A No, I don't.

Q But it would have had to have been one of those two?

A I would say so, yes. That information is available, but I don't have it.

Q Would the name be on the request for quotation, the name of the individual who sent the request?

A I don't know. They don't always indicate the person's name.

Q Sometimes they do, and sometimes they don't?

A Yes.

Q Okay.

A It is not a hard and fast rule.

Q Okay. Does Mr. Crozier still work for Ex-Cell-O?

A Yes, he does.

Q In the Purchasing Department?

A No.

Q Do you know what department he is in now?

A No, I don't.

Q Does Mr. Snyder work for Ex-Cell-O?

A Yes, he does.

Q Do you know what department?

. . . p. 41

A Now, in Planning.

Q Did you have any discussion with either Mr. Crozier or Mr. Snyder prior to the time they created this request for quotation that they were going to do that?

A No, we are an approved vendor for them, and we have the opportunity to quote on everything that goes through the Purchasing Department.

Q Who are some of your competitors?

A Badger Marine. This is for Ex-Cell-O, you are asking this question, competitors for Ex-Cell-O?

Q Okay, I will limit it to Ex-Cell-O for right now.

A That is the only competitor that I know of.

Q Badger Marine?

A Marine.

Q Where is Badger Marine located?

A They are in Michigan. I don't know where.

Q Do you have any competitors for Pratt and Whitney?

A Oh, yes.

Q Who are some of those?

A There are many.

Q Nationwide?

A Yes.

Q How about for Chrysler Corporation, is that like Ex-Cell-O or like Pratt and Whitney?

A Like Ex-Cell-O.

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A There is more than one purchase order number, so, it is more than one order, but whether it was quoted again, as you say, I don't know.

Q I believe you have disclosed that in total for 1979 and 1980 and 1981 on this part number National Auto Part manufactured 11,007 parts?

A Yes.

Q Okay, and this was pursuant to, you think, one quote, but more than one purchase order?

A Yes.

Q How many purchase orders are you aware of?

A Two I am sure of.

Q There may be a third?

A There may be a third, I would have to check.

Q What were the shipping instructions with respect to this part, if you remember?

A The shipping instruction, of course, gives us the packaging, the method of packaging, and the schedule of shipments to Zeeland, Michigan.

Q To Zeeland, Michigan?

A Yes.

Q In Zeeland, I don't know, where is Zeeland in Michigan?

A Do you know where Holland, Michigan is?

Q My understanding is that is on the west side of

. . . p. 50

Q It takes highly skilled people to manufacture these parts?

A Yes.

Q Because it is made with very close tolerances, is that right?

A Yes.

Q And it is an expensive part, it is more than five cents a piece, isn't it?

A It is.

Q Do you know how much, for instance, this part would cost?

A Today's prices?

Q Yes, today's prices. Today's American dollar prices.

A In the vicinity of $50.

Q How much in '79, do you think?

A Probably 30, $35.

Q That would be the price somebody would pay you to manufacture it?

A Yes.

Q Not your actual manufacturing cost?

A No, that is the selling price.

Q We hope your manufacturing cost would be less.

A Much, I hope.

Q Now, National Auto made 11,000 in rough numbers of

. . . p. 51

these parts and sent them all to Zeeland, Michigan, is that correct?

A That is correct.

Q Has National Auto ever shipped any products to the State of Oklahoma?

A No.

Q How do you know that?

A That question again?

Q Which one?

A Have we ever shipped?

Q Have you ever shipped any product to the State of Oklahoma?

A Yes, we have.

Q Okay. What products and when?

A We shipped in 1976, I believe, was the last time we shipped.

Q Whom did you ship to?

A Tinker Air Force.

Q What did you ship?

A It was a nut, nozzle nut.

Q For what engine?

A TF-30.

Q Was that a large quantity, a large order, small order?

A No.

. . . p. 52

Q What is the quantity?

A I can't tell you now what the quantity was, but it was small, a very small quantity.

Q Prior to 1976, had National Auto shipped any products into the State of Oklahoma?

A Not that I know of.

Q As far as you know, 1976 was the last time National Auto shipped any products into the State of Oklahoma, is that correct?

A Yes, that is correct.

Q And you are the person who would know that, if anybody at National does, is that correct?

A Yes.

Q Has National ever had any employees in the State of Oklahoma?

A No.

Q Has National Auto ever had a business address or business location in the State of Oklahoma?

A No.

Q Has National Auto ever entered into a contract with an Oklahoma customer?

A Entered into a contract, I don't understand what that implies.

Q For the sale of a product manufactured by National Auto?

. . . p. 53

A Wouldn't that shipment, that would be a purchase order from Tinker, that would be one.

Q That would be one?

A We would say that is a contract, yes.

MR. KATZ: Do you know when the contract to ship to Tinker was entered into?

MR. GETTE: That wasn't my question when the contract was entered into.

BY MR. GETTE:

Q Just is there any contract with an Oklahoma customer, I don't care when it was entered into?

A Yes, that would be it, yes.

Q Has National Auto ever had any Oklahoma customers?

A No.

Q Is there any other use for the fuel nozzle nut that we have been talking about other than for use on a jet engine?

A Other than use on a jet engine?

Q That is right.

A I don't know for certain, but I would assume not.

Q Does Ex-Cell-O manufacture jet engines?

A No.

Q That is what I thought. And Pratt and Whitney does, is that correct?

A Yes.

. . . p. 55

Q Now, at the time that National Automotive was manufacturing the fuel nozzles, 748333-B, was it your understanding that the fuel nozzle nut would remain in the State of Connecticut during its useful life after the manufacturing process was complete?

A I would say no, because we shipped them to Michigan.

Q Okay. At the time you shipped them to Michigan, was it your understanding that the fuel nozzle nut would remain in the State of Michigan during its useful life?

A That I don't know.

Q It would be your expectation that it would not, is that correct?

A Yes. It could be shipped to Pratt and Whitney, it could be shipped to any other, it could be shipped to airlines.

Q From Michigan?

A I don't know that. From Michigan or in Michigan, you know.

Q It could be shipped to virtually anyplace in the United States from Michigan, is that correct?

A I would think so, yes.

Q The part is not designed to remain in Michigan, is it?

A If there are, we will say overhaul stations in the

. . . p. 58

A Yes.

Q And, indeed, anyplace in the world that can service that aircraft, is that correct?

A Yes.

Q And your company had no way to predict where any particular fuel nozzle nut would end up, is that correct?

A That is correct.

Q The market for that fuel nozzle nut is a nationwide market, it is not a local market?

A Yes.

Q And you were intending to service that entire nationwide market when you manufactured that part?

A As much of it as we could, yes.

Q Now, at the time that you were manufacturing this fuel nozzle nut, were you aware that American Airlines had a maintenance facility in Tulsa, Oklahoma?

A No, I wasn't.

Q Are you aware of that fact now?

A Yes, I am.

Q And the American Airlines maintenance facility is one of those facilities we were referring to earlier where the fuel nut could have ended up?

A Yes.

Q But we have no way of knowing where any specific nut could have gone?

APPENDIX G

IN THE DISTRICT COURT
IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

Cause No. CT-82-739

AMERICAN AIRLINES, INC.,
A DELAWARE CORPORATION,
Plaintiff,

VS.

UNITED TECHNOLOGIES, INC.,
A DELAWARE CORPORATION,
EX-CELL-O CORPORATION,
A MICHIGAN CORPORATION,
AND
NATIONAL AUTOMATIC PRODUCTS CO.,
A CORPORATION,
Defendants.

Plaintiff, American Airlines, Inc.'s
First Set Of Interrogatories To Defendant,
National Automatic Products Co.

PLEASE TAKE NOTICE that Plaintiff, AMERICAN AIRLINES, INC., requires Defendant, NATIONAL AUTOMATIC PRODUCTS CO., by and through its attornies (sic) of record, L. Ray Pearce, Esq., The Carlton Firm, 3109 Carlysle, Post Office Box 190427, Dallas, Texas 75219, and Kirk Fredrickson, Esq., Day, Fredrickson, Merrick & Patton, 2200 Classen Boulevard, Suite 1110, Oklahoma City, Oklahoma 73106, to answer the following interrogatories within thirty (30) days from the date of service thereof, pur-

suant to Okla. Stat. tit. 12 §3210. You are required to answer each of the interrogatories separately and fully in writing under oath. The answers to the interrogatories must be signed by the person(s) making them. Each of the interrogatories shall be considered continuing and should the answers to any of them be changed before trial of this action, you are requested to furnish such different answers in writing and under oath, or it will be assumed the answers originally given continue as your answers to these interrogatories.

. . .

INTERROGATORY NO. 28: For each of the years 1979, 1980 and 1981, please list the name of each entity to whom you sold fuel nozzle nuts (Part Number 748333-B).

ANSWER: Ex-Cell-O Corporation.

INTERROGATORY NO. 29: For each such entity listed in your response to Interrogatory No. 28, please state:

a. Its address;

b. The number of fuel nozzle nuts (Part Number 748333-B) which were sold to it; and,

c. The date(s) upon which each fuel nozzle nut, (Part Number 748333-B) was sold to it.

ANSWER: a) 700 North Centennial Street, Zeeland, Michigan 49464

b) 11,007

c) 4/5/79
4/24/79
4/25/79
5/11/79
5/16/79
5/18/79
6/12/79
6/15/79

6/18/79
6/22/79
7/9/79
8/22/79
8/24/79
9/7/79
9/17/79
9/19/79
9/28/79
10/3/79
10/4/79
10/15/79
11/2/79
11/15/79
11/19/79
11/26/79
2/4/80
2/7/80
2/25/80
3/7/80
4/15/80

APPENDIX H

SELECTED RULES ON PRACTICE AND PROCEDURE IN THE [OKLAHOMA] COURT OF APPEALS

RULE 3.9 PETITION FOR REHEARING

A party who is aggrieved by a decision of the Court of Appeals may file one petition for rehearing combined with brief in its support. On good cause being shown, a party may be allowed to supplement the brief on rehearing, but not more than one petition for rehearing may be presented by any party. The time for filing a petition for rehearing shall be the same as that prescribed for filing a petition for a rehearing in the Supreme Court. See Rule 28, Rules of the Supreme Court, Title 12, Chapter 15, App. Oklahoma Statutes. The time shall run from the date the opinion is filed. An application for an extension of time not to exceed twenty (20) days to file a petition for rehearing and brief in support thereof may, if filed within the time limits provided by said Rule 28, Rules of the Supreme Court, be allowed by the Presiding Judge of the division of the Court of Appeals involved, if in the judge's opinion good cause is shown in the application for an extension.

Amended by order of June 22, 1979; Oct. 22, 1984.

RULE 3.13 REVIEW BY SUPREME COURT ON CERTIORARI

A. A review of an opinion of the Court of Appeals in the Supreme Court on writ of certiorari as provided in 20 O.S. 1971, § 30.1 is a matter of sound judicial discretion and will be granted only when there are special and important reasons and a majority of the justices direct that certiorari be granted. The following, while neither controlling nor fully measuring the Supreme Court's discretion, indicate the character of reasons which will be considered:

(1) Where the Court of Appeals has decided a question of substance not heretofore determined by this court;

(2) Where the Court of Appeals has decided a question of substance in a way probably not in accord with applicable decisions of this court or the Supreme Court of the United States;

(3) Where a division of the Court of Appeals has rendered a decision in conflict with the decision of another division of that court;

(4) Where the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a trial court as to call for the exercise of this court's power of supervision.

B. A party who did not petition for rehearing in the Court of Appeals may not petition for certiorari.

Amended by order eff. Feb. 28, 1972; amended by order of Sept. 3, 1976, eff. Oct. 30, 1976.

RULE 3.19 MANDATE TO TRIAL COURT

If no rehearing be sought in a case assigned to the Court of Appeals within the time prescribed by Rule 3.9 or if a petition for rehearing is denied and no certiorari is sought to the Supreme Court as provided in these rules, or if certiorari is denied by the Supreme Court, the Chief Justice will forthwith direct the clerk of the Supreme Court to issue mandate.

Amended by order of Sept. 3, 1976, eff. Oct. 30, 1976.

SELECTED RULES OF THE SUPREME COURT OF OKLAHOMA

RULE 28. REHEARINGS

(1) Applications for a rehearing, and a brief in support thereof, in any cause, unless otherwise ordered by the Court, shall be made by petition to the

Court, signed by counsel, and filed with the Clerk within twenty (20) days from the date on which the opinion in the cause is filed. No oral argument on petition for rehearing shall be allowed except upon order of the Court. No petition for rehearing shall be filed or considered without proof of service. An application for an extension of time not to exceed twenty (20) days to file a petition for rehearing and brief in support thereof may, if filed within the twenty (20) day time limit above specified, be allowed by the Chief Justice if in his opinion good cause is shown in the application for an extension.

(2) Ten (10) clearly legible copies of petitions for rehearing shall be filed.

Amended by order of Oct. 2, 1967, eff. Dec. 4, 1967; amended by order of June 22, 1979; Oct. 22, 1984.

RULE 29. APPLICATION FOR SECOND PETITION FOR REHEARING

No motion or application for rehearing or review will be allowed after the denial of a petition for rehearing. The Clerk shall not file any such motion or application after the denial of a petition for rehearing.

Amended by order of Oct. 2, 1967, eff. Dec. 4, 1967; Sept. 30, 1976, eff. Oct. 30, 1976.

RULE 33. MANDATE AND ISSUANCE

(1) After the expiration of twenty (20) days from the filing of an opinion proper mandate to the trial court may issue; provided, that when a petition for rehearing is filed within the time prescribed, or by leave of Court, no mandate shall issue until such petition for rehearing shall have been determined. If the petition for rehearing is denied the mandate may issue.

(2) All mandates shall be issued by the Clerk on order of the Chief Justice.

Amended by order of Oct. 2, 1967, eff. Dec. 4, 1967; amended by order of April 7, 1980.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 1989, three true and correct copies of the above and foregoing were mailed, postage prepaid, to: Joe B. Abbey, Esq., 1717 Main Street, Suite 2220, Dallas, Texas 75201, counsel for the Petitioner; and Robert J. Henry, Attorney General for the State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma 73105. I further certify that all parties required to be served have been served.

/s/ Barbara L. Swimley

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Barbara L. Swimley
of
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